YEOH ENG KONG v. CHOO KOK YEOW & ANOR

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
ALIZATUL KHAIR OSMAN JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-02-2018-08-2012]
15 JANUARY 2016

CONTRACT: *Damages – Specific performance – Sale and purchase agreement – Wrongful termination – Claim for damages – Defendants awarded general damages in another suit pertaining to same subject matter – Whether defendants entitled to recover general damages in present suit – Whether damages claimed in both suits arose from same cause of action – Whether 'double' damages awarded*

The appellant ('plaintiff') was the registered owner of a property ('the property') and the respondents ('defendants') were the purchasers of the property for a sum of RM2,800,000 *vide* a sale and purchase agreement ('the SPA') entered into between the plaintiff and the defendants. During the subsistence of the SPA, and prior to its completion, one Shantakumar Santhalingam commenced an action in the High Court ('Suit No. 215') against the plaintiff and the first defendant and obtained an *ex parte* injunction to, *inter alia*, restrain the completion of the SPA. Arising from the said *ex parte* injunction order and in compliance with the order, the plaintiff put the completion of the SPA on hold pending the disposal of the injunction *inter partes* which the defendants agreed. Subsequent thereto, prior to the hearing and disposal of the injunction *inter partes*, the plaintiff proceeded to unilaterally terminate the said SPA. The plaintiff proceeded to file an action in the High Court for, *inter alia*, a declaration that the said SPA had been terminated on the ground of frustration. The defendants, in turn, counterclaimed for specific performance of the SPA and damages for wrongful termination. The defendants alleged that the frustration was self-induced and therefore, the plaintiff could not take advantage by terminating the SPA. The Judicial Commissioner ('JC') ordered that the plaintiff (i) refund monies paid by the defendants; and (ii) pursuant to s. 18(5) of the Specific Relief Act 1950, the defendants be paid damages *in lieu* of specific performance as the property had been sold by public auction. Hence, the present appeal. The plaintiff only proceeded on one ground of appeal, namely, the JC was not entitled to award general damages as the defendants had already been awarded damages in Suit No. 215.

Held (dismissing appeal with costs)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) There was no merit in the plaintiff's contention that the defendants were not entitled to recover damages in respect of its claim for unlawful termination merely because the defendants had been awarded damages for the *ex parte* injunction in Suit No. 215. In this suit, the remedy which

A the defendants were entitled to claim were damages from the wrongful termination of the said SPA by the plaintiff whereas in Suit No. 215, the damages awarded were for the damages suffered by the defendants arising from the grant of the *ex parte* injunction order. The damages awarded in this suit were not claimable in Suit No. 215 as the damages
B arose from a different cause of action altogether. The question of 'double' damages being awarded to the defendants did not arise and the JC had not committed any error of law in awarding damages to the defendants for both damages *in lieu* of specific performance under s. 18(5) of the Specific Relief Act 1950 and general damages for
C wrongful termination of the said SPA. (paras 29-34)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') adalah pemilik berdaftar sebuah hartanah ('hartanah tersebut') dan responden ('defendan') pembeli hartanah tersebut pada harga RM2,800,000 melalui satu perjanjian jual beli ('PJB tersebut') yang
D dimeterai antara plaintif dan defendan. Semasa PJB tersebut masih sah dan sebelum ia dimuktamadkan, seorang bernama Shanthakumar Santhalingam memulakan satu tindakan di Mahkamah Tinggi ('Guaman No. 215') terhadap plaintif dan defendan pertama dan memperoleh injunksi *ex parte* untuk, antara lain, menghalang penyelesaian PJB tersebut. Berikutan
E perintah injunksi *ex parte* dan sebagai mematuhi perintah tersebut, plaintif menangguhkan penyelesaian PJB sementara menunggu pelupusan injunksi *inter partes* yang dipersetujui defendan. Kemudian, sebelum pendengaran dan pelupusan injunksi *inter partes*, plaintif secara sebelah pihak menamatkan PJB tersebut. Plaintif memfailkan tindakan di Mahkamah Tinggi bagi, antara
F lain, satu deklarasi bahawa PJB tersebut ditamatkan atas alasan kekecewaan. Defendan pula membuat tuntutan balas bagi pelaksanaan spesifik PJB tersebut dan ganti rugi bagi penamatan salah. Defendan mendakwa kekecewaan tersebut didorong dengan sengaja oleh plaintif dan oleh itu plaintif tidak boleh mengambil kesempatan menamatkan PJB tersebut.
G Pesuruhjaya Kehakiman ('PK') memerintahkan plaintif (i) membayar balik wang yang dibayar oleh defendan; dan (ii) menurut s. 18(5) Akta Relief Spesifik 1950, membayar ganti rugi kepada defendan sebagai ganti pelaksanaan spesifik kerana hartanah tersebut dijual melalui lelongan awam. Oleh itu, rayuan ini. Plaintif meneruskan rayuan berdasarkan satu alasan rayuan sahaja, iaitu, PK tidak wajar mengawardkan ganti rugi am kerana
H defendan diawardkan ganti rugi dalam Guaman No. 215.

Diputuskan (menolak rayuan dengan kos)
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

I **(1)** Tiada merit dalam hujahan plaintif bahawa defendan tidak berhak mendapat ganti rugi untuk tuntutan penamatan salah semata-mata kerana defendan telah diawardkan ganti rugi untuk injunksi *ex parte* dalam

Guaman No. 215. Dalam tindakan ini, remedi yang berhak dituntut oleh defendan adalah ganti rugi penamatan salah PJB tersebut oleh plaintif manakala dalam Guaman No. 215, ganti rugi yang diawardkan adalah untuk kerugian yang dialami defendan berbangkit daripada pemberian perintah injunksi *ex parte*. Ganti rugi yang diawardkan dalam tindakan ini tidak boleh dituntut dalam Guaman No. 215 kerana ganti rugi yang dituntut berbangkit daripada suatu kausa tindakan berlainan. Persoalan ganti rugi 'berganda' diawardkan kepada defendan tidak timbul dan PK tidak khilaf dari segi undang-undang dalam mengawardkan ganti rugi kepada defendan bagi kedua-dua ganti rugi sebagai ganti pelaksanaan spesifik di bawah s. 18(5) Akta Relief Spesifik 1950 dan ganti rugi am bagi pembatalan salah PJB tersebut.

Legislation referred to:
Contracts Act 1950, s. 74
Specific Relief Act 1950, s. 18(5)

For the appellant - Harpal Singh Grewal (Navinder Singh with him); M/s AJ Ariffin, Yeo & Harpal

For the respondents - Prakash Menon (Vanaja Devi Nambiar with him); M/s Isharidah, Ho, Chong & Menon

[Editor's note: For the High Court judgment, please see Yeoh Eng Kong v. Choo Kok Yeow & Anor [2011] 3 CLJ 102 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Alizatul Khair Osman JCA:

[1] This is an appeal from the decision of the learned Judicial Commissioner who, after a full trial dismissed the appellant's (plaintiff) claim with costs and allowed the respondents' (defendants) counter-claim with costs.

[2] After hearing both counsel's submission and having given due consideration to the appeal before us we unanimously dismissed the appeal with costs.

[3] Our reasons appear below. The parties will be referred to in their original capacities in the court below.

Background Facts

[4] The facts which are largely undisputed have been comprehensively set out by the defendants in their written submission which we have adopted for the purpose of this judgment and are as follows:

(i) The plaintiff is the registered owner of a property bearing postal address No. 43, Jalan Setiabakti Bukti Damansara, 50490 Kuala Lumpur (the said property) and the defendants are the purchasers of the

A said property for a sum of RM2,800,000 *vide* a sale and purchase agreement dated 17 November 2006 (the said SPA) entered into between the plaintiff and the defendants.

(ii) Pursuant to the said SPA, the defendants had, *inter alia*, paid a sum of RM800,000 towards the purchase of the said property:

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(a) a sum of RM56,000 being the earnest deposit;

(b) a sum of RM224,000 as the balance deposit and part payment of the purchase price as per cl. 3.2 of the said SPA;

C (c) in consideration of the time for completion of the said SPA being revised from the extended completion period ie, 17 March 2007 to 17 April 2007, a sum of RM520,000 was paid.

(iii) During the subsistence of the said SPA, and prior to its completion, the plaintiff's then neighbour, one Shantakumar Santhalingam (the said D Shantakumar) filed Kuala Lumpur High Court Civil Suit No. S4-22-215-2007 (Civil Suit No. 215) against the plaintiff and the first defendant and obtained an *ex parte* injunction to *inter alia* restrain the completion of the said SPA, pending the *inter partes* hearing and disposal of the injunction order.

E (iv) Arising out of the said *ex parte* injunction order and in compliance with the order, the plaintiff had put the completion of the said SPA on hold pending the disposal of the injunction *inter partes* which the defendants agreed.

(v) Subsequent thereto, prior to the hearing and disposal of the injunction F *inter partes*, the plaintiff proceeded to unilaterally terminate the said SPA, on the grounds of frustration, as the *ex parte* injunction order made it impossible for the plaintiff to complete the said SPA.

(vi) The defendants challenged the plaintiff's right to arbitrarily terminate the said SPA on the grounds of frustration or at all as the said SPA was G still in force and valid.

(vii) The plaintiff then proceeded to file an action in the High Court for, *inter alia*, a declaration that the said SPA has been terminated on grounds of frustration and are discharged from further performance and/or a H declaration that the said SPA stands terminated by reason of the defendants' breach.

(viii) The defendants challenged the alleged termination on the basis that there was a mutual agreement to put the completion of the said SPA on hold and that any frustration in law, if at all is self-induced by the I plaintiff and asked for, *inter alia*, specific performance of the said SPA.

(ix) On 14 March 2011 (before the commencement of trial), the said property was auctioned off by the plaintiff's chargee bank as the plaintiff failed to service the loan facility.

Decision Of The High Court

[5] The learned Judicial Commissioner at the conclusion of the trial proceeded to dismiss the plaintiff's claim with costs and allowed the defendants' counter claim with costs by ordering, *inter alia*, the plaintiff to refund the sum RM800,000 and further, ordered that the plaintiff pay the defendants damages *in lieu* of specific performance (as the said SPA was no longer enforceable since the said property had been auctioned off) which damages is to be assessed by the learned Senior Assistant Registrar.

The Appeal

[6] At the start of the appeal learned counsel for the plaintiff, Dato' Harpal Singh informed the court that he would not be appealing against the learned Judicial Commissioner's decision that the plaintiff be ordered to refund the said sum of RM800,000 to the defendants. In the course of his submission before us, Dato' Harpal Singh also conceded that the learned Judicial Commissioner was correct in her finding that the said SPA was not frustrated in view of the plaintiff's subsequent conduct in issuing a letter to the defendants on 13 August 2007 extending the date of completion of the SPA.

[7] Learned counsel in fact informed the court that he is proceeding only with one ground of appeal, that the learned Judicial Commissioner had erred in awarding damages when the defendant had already been awarded damages in Civil Suit No. 215.

[8] Learned counsel for the plaintiff's argument is essentially this:

The problem parties faced in not being able to perform the said SPA was due to the *ex parte* injunction order obtained by the said Shantakumar in Civil Suit No. 215. In view of that no damages should have been awarded to the defendants in this suit. The defendants should seek damages for the non-completion of the said SPA in Civil Suit No. 215 and not in this Suit.

[9] Learned counsel argued that there should only be one exercise of assessment of damages. He referred to the first defendant's counterclaim in Civil Suit No. 215 wherein the first defendant had sought the following order:

> An assessment of the damages suffered by the 2nd Defendant as a result of each and every one of the injunction granted *ex parte* herein against the 2nd Defendant by this Honourable Court on 22/3/2007 and/or any injunction against the 2nd Defendant arising therefrom ("Injunctions") from the date of the injunctions (or such other date as this Honourable Court deems just) and until the injunctions be set aside and/or discharged with interest thereon and that costs of the assessment shall be at the discretion of the Deputy Registrar.

[10] In reply, learned counsel for the defendants En P Menon pointed out that this is the first time that the plaintiff is raising this issue. It was not raised before in the High Court.

[11] He disagreed with the plaintiff's submission that the defendants were not entitled to be awarded damages for the present suit as they had already obtained damages in Civil Suit No. 215. Learned counsel submitted that Civil Suit No. 215 and the present suit were two different suits.

[12] Civil Suit No. 215 was a claim for negligence and nuisance by the plaintiff in that suit, the said Shantakumar, against the plaintiff in this suit, Yeoh Eng Keong (as D1) and the first defendant Choo Koh Yew (as D2). In the process the plaintiff had applied for and obtained an *ex parte* injunction order restraining D1 and D2 from disposing the said property, in effect from completing the said SPA.

[13] The present suit which is brought by D1 in Civil Suit No. 215 (as plaintiff and vendor under the said SPA) against the first defendant (D2 in Civil Suit No. 215) and the second defendant (the purchasers under the SPA) is for a declaration that the said SPA has been frustrated due to the *ex parte* injunction order and alternatively for fundamental breach of the said SPA by the defendants.

[14] The defendants had in turn counterclaimed for damages for wrongful termination of the said SPA by the plaintiff. Thus, learned counsel for the defendants contended that Civil Suit No. 215 and the present suit are two different suits with two separate claims. In support of his argument learned counsel pointed out that the plaintiff had earlier applied to the court to consolidate Civil Suit No. 215 with the present suit. However this application was refused by the learned judge and no appeal was lodged against this decision.

[15] In the premises the defendants were entitled to and were rightly awarded damages for wrongful termination of the said SPA. The damages that the defendants are claiming in this suit are damages flowing from the plaintiff's act in wrongfully terminating the SPA. These damages were not claimable in Civil Suit No. 215 as they did not arise from the *ex parte* injunction order but from the plaintiff's wrongful termination of the said SPA.

[16] The learned Judicial Commissioner was not wrong in awarding damages to the defendants as the defendants were entitled in law to claim for the said damages. Counsel therefore urged the court to dismiss the appeal with costs.

Our Decision

[17] We found ourselves in agreement with learned counsel for the defendants.

[18] The damages awarded to the first defendant in Civil Suit No. 215 was for the damages suffered by him as a result of the *ex parte* injunction order obtained by the plaintiff in Civil Suit No. 215 (referred to as the Stop Dealings Order by the learned judge in that Suit).

[19] The damages were ordered to be assessed by the learned judge when allowing the first defendant's (D2 in Civil Suit No. 215) application to discharge the *ex parte* injunction order. The learned judge made the order pursuant to the first defendant's counterclaim for, *inter alia* damages to be assessed arising out of the *ex parte* injunction order granted by the court.

[20] As pointed out by the defendants' counsel the claim by the plaintiff in the present suit is for, *inter alia*, a declaration that the said SPA has been frustrated and consequently the parties thereto are discharged from further performance. Alternatively, that the defendants are in fundamental breach of the said SPA entitling the plaintiff to treat the said SPA as coming to an end.

[21] The defendants in turn counterclaimed for specific performance of the said SPA and damages for wrongful termination. The defendants alleged that the frustration was self-induced and therefore the plaintiff cannot take advantage of his own self-induced frustration to terminate the said SPA. Further, parties have by mutual consent enlarged the time to complete the said SPA due to the grant of the *ex parte* injunction.

[22] The learned Judicial Commissioner in dismissing the plaintiff's claim and allowing the defendants' counterclaim found as follows:

Dari semua keterangan-keterangan yang dikemukakan di atas saya dapati bahawa perintah injunksi *ex parte* bertarikh 22.3.2007 bukanlah merupakan perkara-perkara yang mencelah pelaksanaan (supervening event) bagi penyempurnaan SPA dalam tindakan ini. Masa untuk sempurnakan SPA telah dilanjutkan oleh Plaintif. SPA tidak dikecewakan atas sebab perintah injuksi *ex parte* bertarikh 22.3.2007 dan penamatan SPA berkenaan atas sebab kekecewaan adalah tidak sah di sisi undang-undang.

[23] The learned Judicial Commissioner then made the following order:

(a) that the plaintiff refund the RM800,000 paid by the defendants to the plaintiff;

(b) that pursuant to s. 18(5) of the Specific Relief Act 1952, the defendants be paid damages *in lieu* of specific performance as the said property had been sold by public auction; and

(c) general damages to be assessed.

[24] As stated earlier learned counsel for the plaintiff conceded at the outset of the appeal that the learned Judicial Commissioner was correct in her finding that the said SPA was not frustrated for the reasons stated earlier and therefore the termination by the plaintiff was unlawful.

[25] The plaintiff had also decided not to proceed with their appeal against the learned Judicial Commissioner's order that the plaintiff refund the said RM800,000 to the defendants.

[26] The plaintiff was only proceeding on one ground of appeal, namely the award of general damages by the learned Judicial Commissioner, which in the plaintiff's view the Judicial Commissioner was not entitled to award as the defendants have already been awarded damages in Civil Suit No. 215.

[27] When learned counsel for the defendants pointed out that this was a new issue which was not raised before in the High Court, Dato' Harpal Singh referred the court to the plaintiff's submission in the High Court at p. 1202 of the ROA Bah. C Jld. 2(6) where this issue was raised. We reproduce below the plaintiff's written submission on this issue before the High Court:

> (c) the *concurrent claims for damages made by the Defendants in Suit No. 215* (as evident from paragraph 40.2 of the Defendants' counterclaim against the Plaintiff in Suit No. 215) *as well as the damages now sought by way of an amendment against the Plaintif in the present action which would result in double recovery*.

(emphasis added)

[28] We note however from a perusal of the learned Judicial Commissioner's grounds of judgment that this issue was not addressed by Her Ladyship. Neither was this issue addressed in the plaintiff's written submission.

[29] We find no merit in the plaintiff's contention that the defendants are not entitled to recover damages in respect of its claim for unlawful termination merely because they have been awarded damages for the *ex parte* injunction in Civil Suit No. 215.

[30] We agree with the defendants' submission that there is no question of double recovery (of damages) by the defendants here as the damages awarded in this suit arose from a different cause of action than that in Civil Suit No. 215.

[31] Here the remedy which the defendants are entitled to claim are all the damages which flow from the wrongful termination of the said SPA by the plaintiff (see s. 74 of the Contracts Act 1950) whereas in Civil Suit No. 215 the damages awarded was for the damages suffered by the defendants arising from the grant of the *ex parte* injunction order.

[32] As submitted by learned counsel for the defendants the damages awarded in this suit are not claimable in Civil Suit No. 215 as the damages they are claiming arose from a different cause of action altogether. Therefore the question of 'double' damages being awarded to the defendants does not arise.

[33] The damages awarded may appear to overlap but it is trite law that the defendants must prove their damages. In other words at the assessment before the Registrar, the defendants must prove the damages they suffered flow from the wrongful termination of the said SPA and not from the *ex parte* injunction order obtained in Civil Suit No. 215.

[34] For the above reasons we found the learned Judicial Commissioner had not committed any error of law in awarding damages to the defendants for both damages *in lieu* of specific performance under s. 18(5) of the Specific Relief Act 1952 and general damages for wrongful termination of the said SPA.

[35] We should point out that in respect of the damages awarded *in lieu* of specific performance this was not specifically challenged by learned counsel for the plaintiff in his submission before us.

[36] We therefore dismissed the appeal with costs and order that the deposit be refunded.